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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

SUPPLEMENTAL CITATIONS FOR APPELLEES

In view of the fact that the "Reply Brief for Appellants," was filed too near the call of the case (April 27th) to permit of answer coupled with the fact that Appellants' argument introduced a theory of law with which Appellees violently disagreed, it became necessary to supplement the citations in Appellees' brief; hence in pursuance of the request of the court, Appellees respectfully submit the references to the cases and statutes referred to, with a brief explanation of their applicability.

IN RE MOTION TO DISMISS AND MERITS

Assuming that both Acts 114 and 155 of the Michigan P. A. for 1937 were drawn in question in the Michigan court, "Was it necessary to a disposition of the case, for the Michigan court, to pass on their constitutionality?"

Appellees cited in their brief (p. 1) *Auditor General v. Clifford*, 143 Mich. 626, p. 630, which held:

> "The general rule is that a sale and a conveyance in due form (by the State) for taxes extinguishes all prior liens, whether for taxes or otherwise. This rule is one of necessity, growing out of the imperative nature of the demand of the government for its revenues."

Thus a new chain of title started, free of liens and encumbrances, when the state sold land to which it had acquired absolute title. This was the law in 1906 when the above case was decided.

The drain act was passed in 1923, Act 316 of 1923.

The Appellants bought their bonds in 1927, November 1st.

The case of *Krench v. State of Michigan* (not cited in brief), 277 Mich. 168, decided in 1936, on p. 179, says,

> "The State held title in fee simple. The original title had come to an end and a new chain of title originated with the State * * *. The State, having title in fee, could, like any other owner in fee, deed with reservation of the oil, gas and minerals."

Acts 114 and 155, the acts which Appellants claim violated their constitutional rights, were passed in 1937.

Subsequent to the effective date of Acts 114 and 155 namely in May of 1942 the case of *Meltzer v. State Land*

Office Board (not cited in brief) was decided by the Michigan Supreme Court, 301 Mich. 541 and on p. 544 the court said,

> "Prior to November 29, 1939, title to the land in question was in F. Homer Newton, Charles H. Newton, Osmun Wigg, William Fox and Mildred, his wife. The taxes thereon being delinquent for the years 1930 to 1935, inclusive, the entire parcel was sold by the county treasurer at the annual tax sale in May, 1938, and bid in to the State of Michigan. On November 29, 1939, the equity of redemption not having been exercised by any of the owners, the Auditor General deeded the land to the State. *Thereupon, the State of Michigan became the owner of the title in fee and a new chain of title was started. Krench v. State of Michigan,* 277 Mich. 168; *Rathbun v. State of Michigan,* 284 Mich. 521." (Emphasis supplied.)

It should be noted that the above decision was not grounded on Acts 114 or 155 of 1937 but the basic law urged by Appellees.

Thus from 1906 to 1942, a period which spans the passage of the drain law, the purchase by Appellants of their bonds and the passage of Acts 114 and 155 of 1937, a new chain of title, free from liens and encumbrances, started when the State sold lands to which it held absolute title.

There could not possibly be any impairment of Appellant's contract, nor could there be any necessity for the Michigan Supreme Court to pass on the impairment claim of Appellants because the basic law was never changed during the whole period, 1906 to 1942. Every right possessed by Appellants when they purchased their bonds, still exists.

The Motion to Dismiss should be granted based on *Honeyman v. Hanan,* 303 U. S. 206, *Southwestern Bell Telephone Co. v. State of Oklahoma;* 300 U. S. 206, because,

> "A law enacted after the making of a contract which merely clarifies a prior law does not impair the obligation of the contract." *Garland Co. v. Filmer,* 1 Fed. Supp. 8 (not cited in brief).

QUERIES

Mr. Justice Douglas inquired as to the effect of the "perpetual lien" phrase in Sec. 5 (M. S. A. 11.91) Chapter X Act 316 of 1923, quoted in full pp. 2-3 of Appellee's brief. In reply Mr. Hudson for Appellees drew an analogy between that phrase and the language of section 40 of the general tax law (not cited in brief) M. S. A. 7.81 which reads as follows,

> "The taxes thus assessed shall become at once a debt due to the township, city, village and county * * *, become a lien upon such real property and the lien for such amounts and for all interest and charges thereon shall *continue until payment thereof.*" (Emphasis supplied.)

It seems to follow that, "perpetual" as used in the drain law is synonomous with "continue until payment thereof" in the general tax law, and in view of the fact that drain liens are foreclosed under the tax law, M. S. A. 11.91,

> "All drain taxes assessed under the provisions of this act (the drain act) shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected."

that under the cases cited above, namely, *Auditor General v. Clifford, Krench v. State of Michigan,* and *Meltzer v. State Land Office Board,* both liens terminate when the state acquires absolute title.

In view of the inquiry by the Chief Justice as to when the lien of drain tax installments fixed, it becomes pertinent to explain the following:

> M. S. A. 11.56: "Upon the release of the right of way and damages, or upon the determination and return of the special commissions (special commissioners appointed to determine necessity, see M. S. A. 11.48, 11.49, 11.50, 11.51, 11.52, 11.53), the (drain) commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. * * * He shall before the day of letting and review, apportion the percent of cost of construction of such drain which any township, city or village traversed or benefitted thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare * * *. He shall also apportion the per cent of the benefits to accrue to any piece or parcel of land by reason of the construction of such drain over and above the percent apportioned to any township, city or village at large or to any highway as above provided. * * *."
>
> M. S. A. 11.57: "All apportionments of benefits under the provisions of this act shall be upon the principle of benefits derived * * *."

M. S. A. 11.61 and 11.62 provide for a board of review.

M. S. A. 11.66 provides for legal review by certiorari and contains this significant language,

> *"If no certiorari be brought within the time herein prescribed (10 days) the drain shall be deemed to*

have been legally established, and the taxes therefore legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity."

The case of *Lindsay v. Eastwood,* 72 Mich. 336, referred to in court but not cited in Appellee's brief, although decided in 1888 interpreted language practically identical with the present statute, to-wit:

Lindsay v. Eastwood	*Present Statute M.S.A. 11.91*
The statute under which this ditch tax was assessed declares: "The taxes assessed upon any lands under the provisions of this act shall be, and are hereby, declared to be a perpetual lien upon such lands, to remain such until such taxes, with all lawful costs, interest, and charges, are fully paid, or otherwise legally discharged."	• • • "All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid." (C. L. '29, sec. 4927.)

and on page 338 the court said,

> "The question presented is, when do such taxes (drain) become a lien upon the land? We are of the opinion that they become a lien as soon as they become a charge on the land by the assessment of benefits made by the drain commissioner."

The foregoing *Lindsay* case is cited with approval in *Jacobs v. Union Trust Co.,* 155 Mich. 233, where the court says, p. 236,

> "It is and has always been fundamental, in our revenue system, that a lien upon real estate exists for the purpose of collecting taxes levied thereon.", and "We are of opinion that as between a vendor

> and a vendee of land, in the absence of express statute provision, a lien upon the land for unpaid taxes does not exist until the amount thereof is ascertained and has become a charge which may be discharged by payment."

The exhibit (R. 56A) the original of which in colors was presented in court shows that 11% of the district was paid in full and Appellants frankly admit, p. 11 Brief for Appellants,

> "Upon confirmation of the assessment roll the assessments become liens declared to be perpetual until they are paid, with all lawful interests, costs and charges * * *. The taxpayer (p. 12) may, if he so desires, pay the entire assessments or may pay it in installments."

While the record does not show the date of confirmation of the assessment roll the court could take judicial notice of the fact that it preceded the issuance of the bonds which are dated November 1st, 1927 (Brief for Appellants, bottom p. 3) thus the lien for the entire cost, in the percentages fixed, attached in 1927. When title passed to the State upon failure of anyone to redeem all liens were cancelled. The deferred installments had, in the eyes of the law, been levied, were all payable, were liens and hence were wiped out by the passage of title to the State.

Mr. Justice Jackson inquired as to whether the bonds were special assessment bonds or general obligation bonds. That they were special assessment bonds cannot be disputed in view of the Michigan courts decision in this case 306 Mich. 503, pp. 510-511, cited in Appellees' Brief pp. 5, 11, 27, where reference is made to the *Municipal*

Investors Association v. City of Birmingham, 298 Mich. 314. In this last mentioned case the Michigan court said,

> "Plaintiff says that the additional assessment sought in this case has not yet been levied against the premises and therefore was not a lien when the State acquired title pursuant to the terms of the general tax laws, and hence was not extinguished. In the Baker case (294 Mich. 587) it was claimed that there was nothing in the title of the general property tax law as amended by Act No. 114 of 1937, to indicate that it covered the cancellation of past as well as future taxes and special assessments or that municipalities which have borrowed in anticipation of the collection of taxes or issued special assessment bonds shall have such taxes and assessments cancelled. A review of the briefs filed in the Baker case shows that counsel for plaintiff herein filed a brief *amicus curiae* in which many of the cases relied upon by plaintiff in the instant suit were cited. Notwithstanding the fact that the court had those cases before it, the argument made was repudiated upon the ground that it was unnecessary to include in the title the nature of the interest secured by the purchaser upon the sale, as well as the specific tax incumbrances from which the property was freed in such proceedings, and the court concluded that the statutes in question do not contravene the requirements of the State or Federal Constitution forbidding the impairment of the obligations of contract."* (*Art. I, Sec. 10, U. S. Const.)

Michigan's well known Justice Cooley made the following statement in the case of *Dawson v. Aurelius Township,* 49 Mich. 479, p. 480,

> "The laying out of drains is commonly a matter of mere neighborhood interest; they affect small bodies of land; the taxes laid are local assessments and do not and cannot under the statute become a general charge. In the performance of his duties,

> the commissioner is in no sense the agent of the township and there is no township responsibility for his defaults or misconducts."

This case was decided in 1882 but was cited with approval by the Michigan Supreme Court as late as 1922 in the case *Township of Cooper v. Little,* 220 Mich. 62, p. 64. (Both cases cited in oral argument, but not in brief.)

If the bond is the contract and must look to the revenue to be derived from a special assessment district for payment then it follows that the bond is a special assessment bond as contrasted with a general obligation bond and a perusal of the Michigan decision in the Municipal Investors case 298 Mich. 314, pp. 318-19 leaves no doubt that the bonds there considered were special assessment bonds. The bonds in the instant case are likewise special assessment bonds having been issued on the theory of benefit, for a local improvement and being retireable from special assessment taxes on the lands benefitted.

Reference to the bond form (R. 7-8) shows that,

> "The principal and interest of this bond are payable out of the installments of drain taxes assessed against the lands in the said district and against the County of Oakland, the Village of Clawson and the Townships of Royal (fol. 12) Oak and Troy at large, in proportion to their respective taxation for such improvement as follows: lands in District 77.5%, Oakland County 3.5%, Troy Township 2.5%, Royal Oak Township 6.5%, Village of Clawson 10%," • • •.

Thus it is obvious that the bond is not a general obligation bond.

The Chief Justice also inquired as to whether or not all assessments had been levied and particularly if a deficiency assessment had been levied.

That all assessments had been levied appears positively in the language quoted from the drain law on pp. 5-6, this supplemental brief namely,

> *"If no certiorari be brought within the time herein prescribed (10 days) the drain shall be deemed to have been legally established, and the taxes therefore legally levied,* and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity."

Whether or not a deficiency assessment was made (when all bonds were matured) would not affect Appellants' claim here because they never had the right to assess lands the title to which had become absolute in the state (authorities previously cited) and they still have the right to a deficiency assessment against the rest of the lands and the municipalities at large in proportion to the original assessment. (*Keefe & Bradford v. Clark,* 306 Mich. 503—R. 40-47.)

SUMMARY

If we may be permitted to paraphrase, Act 114 of 1937 declared to the world:

1. Under the law in Michigan, when the State takes absolute title to property all liens and encumbrances are removed and cancelled.

2. You must redeem before the deadline or your interest in the property is gone forever and the State will become the absolute owner.

Act 155 of 1937 declared to the world:

1. We will sell the lands the State owns to the highest bidder but the bids must be equal to or more than 25% of the assessed valuation.

2. All taxing units including drain districts will receive their *pro rata* share of the proceeds.

3. The State owns these lands free and clear and will quit claim them that way.

4. Former owners or persons who had an interest are given a preference in the bidding so bid at the sale or forever hold your peace.

We respectfully submit,

A. Appellants have been deprived of no rights and consequently there can be no impairment of their contract.

B. The law after the passage of Acts 114 and 155 of 1937 is basically the same as it was when appellants bought their bonds, hence there can be no impairment of their contract.

C. If both Acts 114 and 155 were drawn in question in the Michigan Court still there was no necessity for that court to pass on their constitutionality, hence this court is without jurisdiction in the premises.

D. The Motion to Dismiss should be granted and the Motion to Affirm should be granted or decision made by this court consistent therewith.

Respectfully submitted,

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